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No. _____

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IN THE SUPREME COURT OF THE UNITED STATES

_____ Term, 1972

JOHN WESLEY BROWN,
Petitioner

v.

UNITED STATES OF AMERICA
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit issued its opinion on March 15, 1972, affirming Defendant's conviction in the United States District Court for the Western District of Texas. Petitioner's Petition for Rehearing was overruled without opinion April 6, 1972. A copy of the opinion of the Fifth Circuit Court of Appeals appears in the Appendix A to

this Petition at page

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered March 15, 1972, and the Petition for Rehearing was denied April 6, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254.

QUESTIONS PRESENTED

The L al Board denied Petitioner's conscientious objector claim, and states four reasons for denial. None of the reasons stated was a legitimate reason and the Local Board fai led to state which of the reasons it was applying. For example, one of the reasons given by the Local Board was Petitioner's membership in the Bahai'i Community, a religious pacifist organization. The reasons given were: '[The Board Members] felt the registrant had made a late claim since he requested the one on conscientious objector classification after refusing to take the step forward for induction. Registrant also tried to enlist in the Navy. He was associated with the Bahai'i Community. And there is also a letter in the file from the father who states he had no knowledge of his son being a conscientious objector." Petitioner was convicted of refusing induction. The questions presented are: (1) Is reversal of Petitioner's conviction required because the Local Board denied Petitioner's claim for reasons, some of which were not legitimate reasons for denial? (2) Is there basis in fact for the Board's denial of Petitioner's conscientious objector claim?

STATUTES INVOLVED

The Statutes which the case involves are: 50 U.S.C App. Section 462 (a), and The Selective Service Act, 50 U.S.C. Section 456 (j). The text of the Statutes is set forth as Apps. B and C.

STATEMENT OF THE CASE

Petitioner was convicted in the United States District Court for the Western District of Texas of refusing induction into the armed forces in violation of 50 U.S.C. App. Section 462 (a). The case was tried without a jury and Petitioner was convicted by the Court on June 16, 1971.

Petitioner has urged as his defense that there was no basis in fact for the Board's denial of Petitioner's claim of deferment as a conscientious objector. He urges that the Board's denial of his claim cannot be sustained because the Board based its decision at least in part on wrong reasons.

The Board stated its reasons as follows: "The Board members have the following reasons for denying the claim:

1. They felt the registrant had made a late claim since he requested the one on conscientious objector classification after refusing to take the step forward for induction.

2. Registrant also tried to enlist in the Navy.

3. He was associated with the Bahai'i

Community.

4. And there is also a letter in the file from the father who states he had no knowledge of his son being a conscientious objector."

Briefly, the underlying facts are these. Shortly after his eighteenth birthday , Petitioner JOHN WESLEY BROWN, registered with his local draft board, Texas Local Board No. 40, in El Paso, Texas. Exh. 1. Within a month he was classified I-A, but thereafter, on April 1, 1968, Petitioner received a IIS deferment because he was a full time freshman student at the University of Texas at El Paso. Exh. 1, 10. He was again classified I-A on March 18, 1970, after he failed to register at the university for the 1970 Spring Semester. Exh. 1, 10, 102, 105, 106.

After physical examination he was ordered to report for induction on July 20, 1970. App. 19; Exh. 10. He appeared on that date and prior to taking the symbolic step forward, he notified those in charge that he would refuse induction on the grounds that he was opposed to wars. Exh. 36-37.

The State Director directed the Local Board to cancel Petitioner's induction order and reopen his case. The case was reopened and Petitioner filed his Form 150, Conscientious Objector Claim.

On August 20, 1970, Petitioner made a personal appearance before the Board after which the Board solicited letters from friends and relatives concerning his conscientious

objector claim. Exh. 71-79.

One of the letters received was signed by George Wesley Brown, the father of the Petitioner which allegedly related the father's displeasure with Petitioner's friends and denied that the Petitioner was religious or that he had a claim to being a conscientious objector. Exh. 19. The undisputed evidence presented at Petitioner's trial was that this letter was actually written by Petitioner's grandfather as the request and with the help of his Aunt Mary Brown, and signed by his father during a state of intoxication which was so severe that shortly thereafter George W. Brown was committed to William Beaumont Hospital for a long period of treatment of alcoholism. App. 65.

At the next regular meeting of the Board on September 17, 1970, Petitioner was denied conscientious objector status on the ground that he was insincere. He was reclassified I-A. Exh. 65. Within 30 days Petitioner filed a notice of appeal. Exh. 59.

On October 15, 1970, the Board considered the most recent letter concerning Petitioner's claim and then denied the claim. Exh. 58. The reasons stated in support of the Board's denial are: (1) the lateness of Petitioner's claim, (2) his consideration of enlisting in the Navy, (3) his association with the Bahai'i Community, and (4) the letter is his file signed by his father. Exh. 58.

The denial was appealed to the State Appeal Board, which classified the Petitioner I-A, without a statement of reasons. Petitioner was then ordered to report for induction on January 13,

1971, Exh. 52. Petitioner appeared on that date but again refused induction on the grounds that he is conscientiously opposed to wars. Exh. 27-28.

He was indicted by a grand jury and convicted on June 16, 1971, for failure to submit to induction, App. 3,4,5, and convicted. The conviction was affirmed by the United States Court of Appeals for the Fifth Circuit.

REASONS FOR GRANTING WRIT

1. At least one of the reasons given by the Local Board for denying the Petitioner's claim is not a permissible reason, and, therefore, the conviction must be reversed. The holding of the Fifth Circuit in this case is in direct conflict with the recent holding of the Eighth Circuit, United States v. Iverson, No. 71-1262, (8th Cir. Jan. 31, 1972) 5 Selective Service Law Reporter 3120, 455 F 2d 79.

The question there presented is the same as is presented in this case. The Eighth Circuit Court of Appeals in Iverson stated: "... assuming, arguendo, that insincerity can be found from the record, the failure of the local board to state which of the two grounds it was applying is fatal under this Court's rule announced in Caverly v. United States, 429 F 2d, 92, 95, (8th Cir. 1970), wherein we held:

> 'Simply stated from this record, we cannot tell on what basis the board acted and, thus, we are unable to say that a basis in fact supported its determination that

> Caverly should be denied re-classification from I-A to that of a conscientious objector. Under such circumstances, Caverly's conviction cannot be sustained.' "

The concurring judge in the Iverson case simply stated:

"I concur in the result solely because I feel reversal is required under Sicurella v. United States, 348 U.S. 385, 391-392 (1955) and Caverly v. United States, 429 F 2d 92, 95, (CA 8, 1970). Specifically, it is my view that reversal is in order because it cannot be determined which of the two grounds the local board applied in denying conscientious objector status to the Defendant."

The Caverly case was cited by the Petitioner in his brief to the Fifth Circuit and was strenuously argued to the Fifth Circuit panel which heard the appeal. However, the opinion of the Fifth Circuit utterly fails to mention or consider the Eighth Circuit holding which is directly in conflict with its own.

The Fifth Circuit's opinion seeks vaguely to distinguish from the present case the holdings of the United States Supreme Court in Sicurella v. United States, 348 U.S. 385, 75 S Ct. 403, 99 L. Ed. 436 (1955), and Clay v. United States, 403 U.S. 698, 91 S Ct. 2068, 29 L. Ed. 2d 810 (1971). The Fifth Circuit points out that in Sicurella and Clay the State Appeal Board based its denial on a letter from the Attorney General recommending denial for reasons, some of which were impermissible. The Fifth Circuit

opinion states: "In both cases, the receipt of that letter was followed by the Board's denial of the application without any reason stated; and in both, the Court found the Department's letter to be based, in part, upon impermissible grounds."

The Fifth Circuit's opinion ignores the fact that a Board which denies a claim and bases its denial upon partly impermissible reasons is no different from a Board which follows a letter recommending denial of a claim basing the recommendation partly on impermissible reasons.

The attempt to distinguish Clay and Sicurella is vague indeed because logically no distinction exists.

The Eighth Circuit in Caverly and later in Iverson had no difficulty in finding that Sicurella required reversal when one of the reasons stated by the Local Board was impermissible. Yet the Fifth Circuit has not even seen fit to face and discuss the contrary holding of the Eighth Cirsuit Court of Appeals.

Petitioner urges that under the authority of Clay and Sicurella, as correctly applied by the Eighth Circuit in Caverly and Iverson, Petitioner's conviction must be reversed. Petitioner will later in this Petition demonstrate that none of the reasons stated by the Local Board for denying Petitioner's claim is legally permissible. However, under Clay, Sicurella, Caverly, and Iverson, the legal impermissibility of only one of these reasons is sufficient to require reversal.

2. None of the reasons stated by the Local Board were valid reasons for denying Petitioner's claim.

A. Being associated with the Bahai'i Community, a peaceful and religious organization, is not a legitimate reason to deny Petitioner his claim. The fact cited by the Board in support of its finding of insincerity is that Petitioner "was recently associated with the Bahai'i Community." Exh. 58. Since the Bahai'i Community is a religious--pacifist organization, it is difficult to understand how Petitioner's association with it leads to the conclusion that his pacifist beliefs are insincere. App. 62. If anything, his being a member of this association is further proof of his belief in pacifism.

It is reasonable to conclude from the Board's bald statement quoted above that either the Board did not know that the Bahai'i Community is a religious--pacifist organization or the Board entertained some prejudice against the organization and its members.

The Fifth Circuit acknowledged that this was not a legitimate ground.

B. Petitioner's delay in claiming conscientious objector status is not a legitimate reason to deny his claim.

Another reason listed by the Board to support its finding of insincerity was that "the registrant made a late claim since he requested the I-0 conscientious objector classification after he refused to take the step forward for induction." Exh. 58. The presentation of a

conscientious objector claim for the first time to the officers at the induction center rather than the local board has been held to be legally insignificant on the ground that a "legally untutored registrant should [not] be penalized for his failure to distinguish" between the local board and the officers at the induction center. United States v. Stafford, 389 F. 2d 215, 218 (2d Cir. 1968).

The facts of Petitioner's case, however, go far beyond a failure to distinguish between two agencies. Mary Brown, the Chief Executive Secretary of the Local Board No. 40, was not only Petitioner's Aunt, but she undertook to advise him that because he was a member of the sect like the Jehovah's Witnesses, he could not be a conscientious objector. App. 58. She had expertise and authority in Selective Service matters so that Petitioner, very naturally and reasonably, relied upon the advice she offered concerning his Selective Service classification. App. 57. Simply stated, she told him on a few occasions that he did not meet the legal requirements of a conscientious objector and, therefore, he should not bother to apply. App. 55-57. He heeded her advice. Nevertheless, when he reported for induction the first time, he realized that his conscience would not permit him to submit to induction regardless of whether he qualified legally as a conscientious objector. App. 56; Exh. 38. Indeed, in Petitioner's letter to the State Director of the Selective Service System written after his refusal, he states, "I do not wish to go to jail, but if I am to choose between serving in the Armed Forces and jail, I must choose jail." Exh 82. Justice Black has characterized such an attitude as evidence of

the depth and sincerity of a conscientious objector's convictions: "for them that voice (of conscience) was so loud and insistent that both men preferred to go to jail rather than serve in the Armed Forces." Welsh v. United States, 1970, 398, U.S. at 333, 26 L. Ed. 2d at 317. Helwick v. Laird, 438 F. 2d 959, 965, (5th Cir. 1971).

Petitioner was conscientiously opposed to wars but because of the information and advice he had received from his Aunt Mary, Clerk of his Local Board, he had not presented his beliefs to the Board prior to his induction. In United States v. Burns, 431 F. 2d 1070 (10th Cir. 1970), the registrant received similar information and advice from a clerk at his local board but the clerk was in no way related to him or known to him other than as a board clerk. Burns was told that because he was raised a Catholic, he could not qualify. Id. 1070. Similarly, Mary Brown had led Petitioner to believe that only members of the sects like Jehovah's Witnesses could qualify. App. 55. The Court held that misleading and incorrect information received from the clerk of the board was a sufficient excuse for lateness of Burns' conscientious objector claim. Burns, 1074. Burns' conviction was reversed. See also Peterson v. Laird, 3 S.S.L.R. 3210 (N.D. Cal. 1970) where the registrant was not allowed to file SSS Form 150 on the ground that he was not a member of a certain religious sect.

And, in United States v. Fisher, 442 F. 2d 109 (7th Cir. 1971) Fisher's conviction was reversed because a clerk of his board falsely told him that nothing new had been added to his file and that another clerk was the appeals agent.

The lateness of the claim, then, was not a legitimate reason for the Board to deny Petitioner's claim.

C. Considering Navy enlistment in order to avoid combat service to which Petitioner is conscientiously opposed is not inconsistent with his conscientious objector claim.

Another reason relied upon by the Board in support of its findings of incincerity is that "registrant tried to enlist in the Navy." Exh. 58. In his answer to questions number 4 on SSS Form 150, Petitioner states that he inquired about Navy enlistment in the belief that in the Navy he would avoid armed combat. Exh. 86. He testified at his trial that as a result of his investigation in Navy enlistment he found the Navy geared for war and service in it would be in conflict with his beliefs. App. 68. A number of authorities have held that application and enlistment in Officer Candidate School and participation in college ROTC do not provide a basis in fact for a finding in insincerity. United States v. Wingerter, 423 F. 2d 1015 (5th Cir. 1970); Hand v. Laird, 3 S.S.L.R. 3298 (N.D. Calif. 1970); Rautenstrauch v. Laird, 313 F. Supp. 1970 (W.D. Tex. 1970).

In Petitioner's situation, his inquiry into Navy enlistment must be considered reasonable. He believed he had two alternatives -- induction into an Army deeply involved in armed conflict which was against his convictions or being incarcerated in a penitentiary. It does not cast doubt upon his sincerity that Petitioner sought and examined the alternative of Navy enlistment in order to determine whether it was consistent

with his beliefs. Indeed, the examination of this alternative was a very natural and intelligent approach to the situation. He thereby tested the limits of his belief and discovered himself to be more resolved in his opposition to all wars. Thus, the only alternative open to him was to refuse induction and accept the consequences. Exh. 82.

This was not a legitimate reason for the Board to deny his claim.

D. The letter which purports to convey the thoughts of the father of the Petitioner but, which, in fact, was written by others, and signed by the father in a state of intoxication is not a fact on which the Local Board can base its decision.

The fourth reason for the board's finding of insincerity is the "letter in this file from the Father who states he had no knowledge of his son being a conscientious objector." Exh. 58. The unrebutted evidence introduced at Petitioner's trial was that this letter was written by the Petitioner's grandfather at the request of his Aunt Mary Brown, Clerk of the Local Board No. 40, and signed by his father, George W. Brown, while he was in a state of intoxication so severe that he did not know what he was signing. App. 60-61, 65. These facts were brought to the attention of officials of the State Headquarters of the Selective Service System in a letter dated April 20, 1971, requesting a reopening of Petitioner's Selective Service classification. Exh. 17-21. Enclosed with the letter was a statement by George Wesley Brown impeaching the validity of the letter. Exh. 21. Nevertheless, Petitioner's classification was not subsequently reopened.

There is no legal way in which a hoax can be used to justify a finding of insincerity. Moreover, the fact that a clerk of the local board played a part in, indeed, instigated the hoax makes its use by the board even more insidious.

In Parr v. United States, 272 F 2d 416 (9th Cir. 1959) the court discounted the derrogatory statement of an official of the Watchtower Bible and Tract Society concerning the registrant on the grounds that neither the board or the court could know the standards by which the official gauged the conduct which he labeled "spiritually sick...." Id. 420. In contrast to the present case, there was no evidence in Parr that the official's statements were anything but what he truly believed. If statements of what a person truly believes can be discounted on the ground that the person may be applying a very strict moral and religious code to the conduct of a registrant, then the falsified statements in the letter purporting to convey the opinion of George Wesley Brown must be discounted.

CONCLUSION

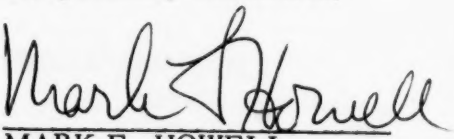
The attempt of the District Court to cite additional reasons of its own for rejecting Petitioner's claim cannot be considered. "It is well to remember that it is not for the courts to sit as super draft boards, substituting their judgments on the weight of the evidence for those of the designated agencies." Witmer v. United States, 348 U.S. 375 (1955).

Even if one or more of the reasons stated by the Local Board was legitimate, there is no way to know what weight of the evidence was

given by the Board to the illegitimate reasons or whether the Board might have decided otherwise, had it considered only legitimate reasons.

It is respectfully submitted that the reliance by the Local Board at least partly on erroneous reasons in denying Petitioner's claim requires reversal. This Petition for Certiorari should be granted.

Respectfully submitted,



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APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-2695

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JOHN WESLEY BROWN,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

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(March 15, 1972)

Before BELL, DYER and CLARK, Circuit Judges.

CLARK, Circuit Judge: John Wesley Brown appeals his nonjury conviction of failing to submit to induction into the armed forces. 50 U.S.C.A. App. § 462 (a). His sole defense was that his local board had unlawfully refused to classify him as a conscientious objector. After a full trial upon the merits, the district judge found that there was a "basis in fact" for the board's action, *Estep v. United States*, 327 U.S. 114, 122, 66 S.Ct. 423, 427, 90 L.Ed. 567, 573 (1946), and consequently adjudged Brown guilty. We affirm.

Brown first registered with his local board on May 18, 1967, but made no claim to conscientious objector status at that time, although he was shortly thereafter classified 1-A. He later applied for and received a 2-S undergraduate student deferment, because he had become a freshman at the University of Texas. He retained this deferment until he was placed on scholastic probation and failed to register for the spring 1970 semester. He was then reclassified 1-A and ordered to report for armed forces physical examination. He submitted a "current information questionnaire" on May 6, 1970, which indicated that he had completed two years of college, but still made no conscientious objector claim. Brown was ordered to report for induction July 20, 1970, and on that date indicated to officials in charge that he would refuse induction on the ground that he was opposed to all war. On August 4, 1970, he first formally notified his local board of his claim, stating: "I became aware that I am a conscientious objector once I was notified of induction. I would like to request a 150 form to file for conscientious objector."

Brown thereupon filed his SSS Form 150 with the local board, and also forwarded a letter to the State Director of the Selective Service System, in both of which he outlined his religious beliefs and stated his opposition to war in all forms. The substantive content of those beliefs is not at issue here. Apparently as a result of his letter, the State Director, pursuant to 32 C.F.R. § 1625.3, requested that the local board reopen Brown's classification and indicated that such reopening would cancel the induction order. The local board thereupon notified Brown that he should appear for

a personal interview on August 20, 1971. At that interview, Brown indicated that: he had started thinking about his claim several years before but had not brought it up with the board because he thought it was not based on "religious grounds"; he was attending meetings of the Baha'i faith; he had tried to enlist in the Navy because he felt the Navy was "away from the conflict"; he did not know what he would do if someone were to attack this country; and that he could not explain why he did not realize until he went for induction that he was a conscientious objector. The board then indicated it needed more information, and received from Brown a list of family, friends, and other references who might be helpful in assessing his beliefs. The board contacted the six persons on that list, asking for any personal knowledge each had concerning Brown. Three of these responded; one indicated he had not sufficient information upon which to base any judgment as to Brown's beliefs, and the other two lent some support to the claims Brown had made. The board also wrote Brown's father asking that he "give any information which would confirm or refute your son's claim that he is a conscientious objector." The reply from Brown's father, George W. Brown, besides indicating displeasure with some of John's friends at the University, also stated that John "has never been religious, and as far as I know he has no claim to being a conscientious objector." After reviewing all information before them, giving special consideration to all letters submitted, the board unanimously concluded that Brown was not sincere and denied his request.

The board took final action on Brown's application on October 15, 1970, by deciding not to reopen his classification after having received an additional letter in his behalf. The board members assigned the following reasons for denying the claim:

1) the lateness of the claim
2) Brown's attempt to enlist in the Navy
3) his recent association with the Bahá'í community
4) the letter from his father

The board's decision was unanimously affirmed by the State Appeal Board on November 13, 1970, and Brown was ordered to report for induction January 13, 1971. He at that time again refused to take the symbolic step forward, and the prosecution which is the subject of this appeal ensued.

Two separate attacks are made here by Brown in his effort to undermine the board's classification. He first argues that none of the four reasons listed by the board furnishes a basis in fact for the action taken. Concerning the lateness of his claim, he points out that he would not have had reason to apply for a 1-O classification until he had lost his *lower* 2-S classification, and cannot be penalized for not doing so;[1] that lateness in and of itself will not support a finding of insincerity;[2] and that his undisputed testimony in the court below shows that the sole reason for his lateness was

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[1]United States v. Stetter, 445 F.2d 472 (5th Cir. 1971)
[2]Rothfuss v. Resor, ____ F.2d ____ (5th Cir. 1971) [No. 30850, June 15, 1971].

his reliance upon the erroneous advice he received from his aunt, the clerk of the local board, who told him he could not qualify for conscientious objector status. As to the attempt to join the Navy, Brown contends that this is not necessarily inconsistent with his professed beliefs, and that indeed, it was precisely the type of possibility an intelligent person might pursue when his only other alternatives were either prison, or a military commitment his conscience could not abide. Third, Brown asserts that the board must have either been unaware that the Baha'i Community is a religious-pacifist organization, or was prejudiced against its membership since, if anything, his participation therein substantiates his claims. Finally, Brown states before us, as he did at the trial below, that the letter from his father was actually prepared by his grandfather and the same aunt who misled him as to his right to a 1-O classification, and that the two of them cajoled his father into signing the letter while he was intoxicated.

The courts are not the super draft board that those who are unsuccessful before their board would have them be. The orderly processing of men into our armed forces — and more importantly, a clear Congressional mandate — will not allow it. Absent the application of some erroneous limiting procedure — a factor not present here, we look only to the record developed before the board to decide whether there was a basis in fact in that record for its decision that Brown was insincere.

Though the underlying policy and the law indeed afford the board an expansive discretion, it is nevertheless less than an unbridled one. There must be "hard, provable, reliable facts" in the record which provide a basis for disbelieving Brown[3] — facts which so substantially blur the picture he has painted as to cast doubt on his sincerity.[4] Such facts are present here.

The timing of Brown's application was certainly such as to cast doubt upon his veracity and sincerity, and be worthy of the board's consideration. *Rothfuss v. Resor, supra* n. 2 at 11; *United States v. Henderson,* 411 F.2d 224 (5th Cir. 1969). It does not avail Brown to argue that *Rothfuss* forbids denials based *solely* upon the timing of an application. Brown's belated realization of his conscientious objector status did not occur in a vacuum. It was the coalescence of that fact with several others that caused his application to be greeted with unanimous skepticism.[5] The district judge summarized those facts in the following fashion: "it would appear to the Court that due to the shallow, uncertain nature or basis of the Defendant's claim, the sudden acquisition of belief that synchronized so perfectly with the Defendant's poor scholastic record and subsequent loss of his student deferment, as well as his attempt to enlist in the Navy to avoid combat,

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[3]Helwick v. Laird, 438 F.2d 959, 963 (5th Cir. 1971).

[4]Kessler v. United States, 406 F.2d 151, 156 (5th Cir. 1969).

[5]While *Rothfuss* bars sole reliance on untimeliness to prove insincerity, it clearly indicates that tardiness coupled with other factors such as an attempt to apply for noncombatant duty, could be sufficient.

and the other facts shown in the Board's file, the Court accordingly finds that there is a substantial basis in fact for the denial of the request for classification by the Board of 1-O."

We agree with Brown that he should not be faulted for not applying for 1-O status while he was allowed a higher 2-S deferment. However, there is nothing in the record to indicate that Brown was penalized for this delay.

We do not find Brown's explanation based upon the advice he received from his aunt sufficient to overcome the adverse inference the board drew from the May to August delay in filing after he was reclassified 1-A. Realizing that this circuit has been less than fully receptive to arguments based upon the misleading of a registrant by the Selective Service, *United States v. Taylor*, ____ F.2d ____ (5th Cir. 1971), *reh. den.* ____ F.2d ____, Brown urges us to look to decisions of other circuits. However, his situation is completely unlike any of the cases he relies upon. *See, e.g., United States v. Fisher*, 442 F.2d 109 (7th Cir. 1971); *United States v. Burns*, 431 F.2d 1070 (10th Cir. 1970). All those cases involve registrants who, due to inexact Selective Service guidance, failed to file any claim at all, or to pursue a timely appeal. But Brown was allowed to make his conscientious objector claim, even though it came long after the board was required to afford him such an opportunity. It then became incumbent upon him to clearly establish his right to the exemption he sought, including one of the most crucial elements of his claim — his own sincerity.

It simply cannot be said that Brown was not fully on notice, after having received what amounted to a special dispensation to make his claim, that his tardiness would be a critical issue before the board. We hold that the burden was then upon him to affirmatively present for the board's evaluation the facts concerning his conversation with his aunt. Having failed to do this, he cannot now fault the board's decision by imputing to them notice of these familial exchanges. Any other decision would only serve to "frustrate administration of the Selective Service System by permitting a registrant first to stand aloof from the process designed to bring such possibly determinative facts to light ... and then to challenge the firmness of the factual foundation for his draft board's discretionary actions." *United States v. Houston*, 433 F.2d 939, 941 (2nd Cir. 1970), quoted with approval in *United States v. McDuffie*, 443 F.2d 1163, 1165 (5th Cir. 1971). As the Supreme Court said in *McKart v. United States*, 395 U.S. 185, 198 n. 15, 89 S.Ct. 1657, 1665 n. 15, 23 L.Ed.2d 194, 206 N. 15 (1969), "the smooth functioning of the system may well require that challenges to classifications based upon facts not properly presented to the board be barred." Though this board had no affirmative duty to seek out information that might mitigate the obvious doubt that lateness had cast upon Brown's sincerity, *McCoy v. United States*, 403 F.2d 896, 899-900 (5th Cir. 1968), we note that at his interview he was specifically asked to explain why he had not realized until induction that he was a conscientious objector, but he could not do so. We conclude that the circumstances surrounding Brown's late claim, in light of the other facts the board knew when it rendered its de-

cision, formed a basis in fact for its denial of the application.

We deal only briefly with the three other "reasons" offered by the board in support of its decision not to reopen Brown's classification. The explanation Brown offered to demonstrate a consistency between his beliefs and his attempt to join the Navy is a plausible one. But it is not the only one, and we decline to disturb the board's judgment that the context in which the attempt was made was evidence of insincerity.[6] As to the issue of whether or not the letter from Brown's father was actually composed by him, we pause only to note that the dispute was never presented to the board. Apparently, the district judge perceived no reason to consider it. We refuse to be the first to assess the truth in this episode. The board's final decision in which the letter was specifically mentioned, was rendered October 15, 1970, and even acknowledging that some reasonable time should be allowed to demonstrate the reliability of evidence enumerated therein, the attack here came far too late. Brown's counsel did not alert the board to the possible speciousness of this letter until April 21, 1971, three weeks after Brown had been indicted, when he moved the board to reopen his classification. Clearly this challenge after the process had become complete should be barred. It is imperative to the functioning of the local board that this court not consider de novo the classifications that this body makes, but only review those facts that were properly presented to it in order

[6]See note 5, *supra*.

that we might determine whether they form a basis for the action taken. Courts cannot consider and assess information Brown should have, but did not timely bring to the Board's attention. Finally, we agree with Brown that his association with the Baha'i community cannot support the board's finding of insincerity. We are at a loss as to why the board found this fact significant at all; however, as is discussed below, we do not find that the board's stated reliance thereon vitiates the remaining valid grounds for its decision.

In his second attack upon the board's action, Brown contends that if any one reason it gave for the denial of his application is invalid, then no matter how many valid reasons are offered, the denial cannot stand. He attempts to support this position by citing *Clay v. United States*, ____ U.S. ____, 91 S.Ct. 2068, 29 L.Ed. 2d 810 (1971) and its reliance upon *Sicurella v. United States*, 348 U.S. 385, 75 S.Ct. 403, 99 L.Ed. 436 (1955), but they do not lend any support to this proposition. In both *Clay* and *Sicurella*, the Department of Justice forwarded a letter to the State Appeals Board recommending that the particular registrant's request for conscientious objector status be denied. In both cases, the receipt of that letter was followed by the Board's denial of the application without any reason stated; and in both, the Court found the Department's letter to be based, in part, upon impermissible grounds. Since the Board in *Clay* and *Sicurella* made no statement of the reasons for its action, the Court had no way of knowing whether the denial was based upon the impermissible grounds suggested by the Department rather than on some unexpressed legitimate ground.

Concluding that the risk was too great that the classifications and subsequent convictions for refusing induction were based on the department's invalid reasons, the Court reversed.

> [W]e feel that this error of law by the Department, to which the Appeal Board might naturally look for guidance on such questions, must vitiate the entire proceedings *at least where it is not clear that the Board relied on some legitimate ground.* Here, where it is impossible to d e t e r m i n e on exactly which grounds the Appeal Board decided, the integrity of the Selective Service System demands, at least, that the Government not recommend illegal grounds. United States v. Sicurella, supra at 392, 75 S.Ct. at 406. (emphasis added)

Here, the local board stated its reasons; we can determine exactly which grounds it relied upon. Speculation is unnecessary. It is clear that all save one of the stated reasons were legitimate grounds. Dismissing that one legitimate ground, we are satisfied the others are sufficient to provide a basis for the conclusion that Brown was insincere in his professed beliefs.

Inasmuch as Brown has demonstrated no error in the decision below, his conviction is

AFFIRMED.

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APPENDIX B

50 U.S.C. App. Section 462 (a) Offenses and penalities.

(a) Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of the title [sections 451, 453, 454,455, 456 and 458-471 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said title [said sections], rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making, of any false statement or certificate regarding or bearing upon a classification or in support of any request for a particular classification, for service under the provisions of this title [said sections], or rules, regulations, or directions made pursuant thereto, or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title [said sections], or who knowingly counsels, aids, or abets another to refuse or evade resitration or service in the armed forces or any of the requirements of this title [said sections], or of said rules, regulations or directions, or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title [said sections], or rules, regulations, or directions made pursuant to this title [said sections], or any person or persons who shall knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this title [said sections], or the rules or regulations made pursuant thereto, or who conspires to commit any one or more of such offenses, shall upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by Court martial in any case arising under this title [said sections] unless such person has been actually inducted for the training and service prescribed under this title [said sections] or unlesshe is subject to trial by court martial under laws in force prior to the enactment of this

title [June 24, 1948]. Precedence shall be given by courts to the trial of cases arising under this title, and such cases shall be advanced on the docket for immediate hearing, and an appeal from the decision or decree of any United States district court or United States court of appeals shall take precedence over all other cases pending before the court to which the case has been referred.

APPENDIX C

The Selective Service Act, 50 U.S.C. App. Section 456 (j)

(j) Nothing contained in this title [sections 451, 453, 454, 455, 456 and 458-471 of this Appendix] shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term "religious training and belief" does not include essentially political, sociological, or philosophical views, or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, [sections 451, 453, 454, 455, 456, and 458-471 of this Appendix], be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period equal to the period prescribed in section 4 (b) [section 454 (b) of this Appendix] such civilian work contributing to the maintenance of the national health, safety, or interest as the local board pursuant to Presidential regulations may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title [section 462 of this Appendix], to have knowingly failed or neglected to perform a duty required of him under this title [sections 451, 453, 454, 455, 456 and 458-471 of this Appendix].

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1453

JOHN WESLEY BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 456 F. 2d 983. The opinion of the district court is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 15, 1972, and a petition for rehearing was denied on April 6, 1972. The petition for a writ of

certiorari was filed on May 6, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1)

QUESTIONS PRESENTED

1. Whether a decision by a local board must be set aside where one of several reasons for its conclusion that a claimant for conscientious objector status was insincere, was not legitimate.

2. Whether the conclusion that petitioner was insincere had a basis in fact.

STATEMENT

After a non-jury trial in the United States District Court for the Western District of Texas, petitioner was convicted of willfully refusing to submit to induction into the Armed Forces, in violation of 50 U.S.C. App. 462(a). He was sentenced to the custody of the Attorney General for an indeterminate period in accordance with 18 U.S.C. 5010(b). The court of appeals affirmed (Pet. App. A).

Petitioner registered with his local board on May 19, 1967, and was initially classified I-A (SSF 10).[1] Upon entering college, he was classified II-S (student deferment), and he remained in that classification until he was placed on scholastic probation and failed to register for the spring 1970 semester (SSF 10, 91-92). On March 18, 1970, he was again classified I-A (SSF 10).

On May 6, 1970, petitioner reported for a physical examination and was found fully acceptable for mil-

[1] "SSF" refers to petitioner's selective service file.

itary service (SSF 10). Shortly thereafter, he sought unsuccessfully to enlist in the Navy (SSF 24). On July 8, 1970, his local board ordered him to report for induction on July 20, 1970 (SSF 80). On that date, petitioner indicated that he would refuse induction because he was opposed to war. On August 4, 1970, he formally notified the local board that he was a conscientious objector (SSF 77). The following day he completed and returned an SSS Form 150 (Special Form For Conscientious Objectors), in which he stated that he had first acquired doubts about war while in high school; that he was opposed to all wars; that he was attending meetings of the Baha'i faith; and that although his beliefs were not based on religious convictions, he held them as strongly as if they were so (SSF 71-74).

The State Director of Selective Service ordered the local board to reopen petitioner's classification and to cancel the outstanding induction order (SSF 65). The local board interviewed petitioner on August 20, 1970, to develop further facts regarding his conscientious objector claim (SSF 70). The board delayed its decision pending receipt of information from his references (SSF 62). The board also contacted petitioner's father, who replied that his son had never been religious and as far as he knew was not a conscientious objector (SSF 50).

The board denied petitioner's claim as a conscientious objector on September 17, 1970, on the ground that petitioner was not sincere (SSF 10, 49). The board received an additional letter on September 21,

1970 (SSF 46), but decided finally on October 15, 1970, not to reopen petitioner's classification and gave the following reasons: (1) the lateness of the claim; (2) petitioner's attempt to enlist in the Navy; (3) his recent association with the Baha'i community; and (4) the letter from petitioner's father (SSF 42).

Petitioner appealed the I-A classification (SSF 43) and his file was forwarded to the appeal board on October 20, 1970 (SSF 39-40). On November 13, 1970, the appeal board voted unanimously to affirm the I-A classification (SSF 9). The local board thereafter ordered petitioner to report for induction on January 13, 1971. He refused to submit to induction on that date and his indictment, trial and conviction followed.

ARGUMENT

1. Petitioner contends (Pet. 6-9) that one of the reasons supporting the legal ground on which the local board rested its decision was invalid, and that therefore, under the rationale of *Sicurella* v. *United States*, 348 U.S. 385, and *Clay* v. *United States*, 403 U.S. 698, that decision must be set aside and his conviction reversed.

As the court below pointed out, however, *Clay* and *Sicurella* are not controlling here. Those cases involved the situation where the board "made no statement of the reasons for its action," while here "the local board stated its reasons" and hence it is possible to "determine exactly which grounds it relied upon" (Pet. App. A, pp. 10a-11a).

The decisions of the Court of Appeals for the Eighth Circuit cited by petitioner (*Caverly* v. *United States*, 429 F. 2d 92, and *United States* v. *Iverson*, 455 F. 2d 79) similarly are different from the present case. In those cases the local board stated several legal grounds for its decision, in addition to the reasons supporting each legal ground. The court found that some of the legal grounds given were not supportable, and concluded that since it could not be determined on which legal ground the denial was based, it could not affirm the denial of conscientious objector status although supported by other, proper grounds. By contrast, in the present case the court below concluded only that one of the reasons given by the board as supporting the sole legal ground for its decision (insincerity) had no probative value—the board's reference to petitioner's association with the Baha'i community. The court below correctly held that here "[s]peculation [concerning the legal basis of the board's decision] is unnecessary" (Pet. App. A, p. 11a), and that accordingly the board's invalid reason could be disregarded.

2. Contrary to petitioner's contention, there was a basis in fact for the board's denial of his conscientious objection claim for insincerity. The court of appeals, after setting aside the reason which it found impermissible, held that "the others [reasons] are sufficient to provide a basis for the [board's] conclusion" (Pet. App. A, p. 11a). The full discussion of this matter by the court of appeals (see *id.* at pp. 4a-11a) shows that there were facts which were inconsistent

with his alleged beliefs. The court below properly held that "the circumstances surrounding [petitioner's] late claim, in light of the other facts the board knew when it rendered its decision, formed a basis in fact for its denial" of petitioner's claim (Pet. App. A, pp. 8a-9a).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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